In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1418

WALTER H. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that a new trial is required because government counsel personally did not reveal to the jury the full extent of a plea bargain with a critical prosecution witness, although all the conditions of the bargain were disclosed by the witness' lawyer, testifying for the defense.

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of securities fraud (counts 1-3), mail fraud (counts 4-5) and conspiracy (count 6), in violation of 15 U.S.C. 77q(a), 18 U.S.C. 1341 and 18 U.S.C. 371. He was sentenced to consecutive terms of imprisonment for five years and cumulative fines of $5,000 on the three securities fraud counts and probation for five years on the remaining three counts. The court of appeals affirmed in part and remanded for a hearing on matters

unrelated to the issue raised in the certiorari petition (Pet. App. A; see p. 8, *infra*, n. 4).

1. The evidence showed that in 1957 co-defendant Charlie Parker organized Professional Service Corporation in New Orleans, Louisiana. Its primary corporate purpose was to collect bills owed to doctors and dentists and to advance to them the amounts owed by patients, less a substantial discount (Tr. 546-769).[1] To generate operating funds, Parker sold "Special Charter Member Contracts," convertible into common stock and carrying an interest rate of ten percent (Tr. 550). Shortly after incorporating, Parker met petitioner, a securities dealer in Monroe, Louisiana. Thereafter, petitioner became a shareholder and director of Professional Service and the primary salesman of the charter member contracts (Tr. 563-564). From that time until mid-1968, when Professional Service was declared bankrupt, petitioner sold more than $4,000,000 of charter member contracts to individuals in the Monroe area and earned over $750,000 in commissions and bonuses (Tr. 564-565).

Petitioner's success in selling the charter member contracts was in large part attributable to his sales presentations and representations made to prospective investors. Petitioner told prospects that the company was sound; that the ten percent return was greater than could be obtained at other financial institutions; and that the corporation would have $2,000,000 left even if it were required to redeem all of the member contracts. Moreover, petitioner invariably displayed literature such as an investors list containing the names of prominent citizens (often without their consent); a

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[1]We are lodging with the Clerk of this Court the four-volume transcript of the trial and sentencing hearing ("Tr.").

letter to the executor of an estate representing that the deceased had invested $50,000 in charter member contracts and had received $47,500 in interest payments during his lifetime and that the estate would soon receive return of the entire principal; and financial statements purporting to show assets of the corporation valued at up to $6,000,000, with substantial growth reflected in each ensuing statement (Tr. 242-253, 355, 363, 426-446, 463-464, 477-479, 488-490, 501-502, 512-515, 536-537, 1017-1018, 1034-1047). Petitioner constantly assured investors who later inquired that their money was in safe hands.

From the outset, Professional Service operated at a loss. The number of clients was minimal and the meager income from financing medical bills never justified interest payments of ten percent on the charter member contracts (Tr. 82-96, 112, 398-399). Nevertheless, Professional Service continued to make the interest payments, using funds received from later sales of other charter member contracts. In addition to this kiting activity, Parker, as chief executive of Professional Service, siphoned off charter member contract income for personal use and for support of a number of other failing enterprises that he headed (Tr. 112-119, 589, 627-631, 653-655). At the time of bankruptcy in 1968, Professional Service owed $4,000,000 to investors and had a liquidated asset value of $100,000 (Tr. 391-393).

Petitioner was closely associated with the operations of Professional Service, had access to its books of accounts, had close ties with Parker, including investments in other ventures, and was responsible for the preparation of much of the paraphernalia used in his sales kit. Parker, testifying for the government,

stated that, in lieu of a profit and loss statement, petitioner urged the preparation of a "Statement of Condition," reflecting the large amount of income flowing to Professional Service, primarily from sales of charter member contracts (Tr. 566). According to Parker, petitioner had inserted statements such as "assets over six million dollars" and "one of Louisiana's fastest growing financial institutions" in materials issued by the company (Tr. 577). Parker testified that petitioner was always aware that the company operated at a loss because Parker had told him so (Tr. 736-737).[2]

In March 1968, another of Parker's corporations, Affiliated Investment, was declared bankrupt following an examination by government auditors. When news of the bankruptcy reached holders of Professional Service charter member contracts, many communicated with petitioner, who continued to assure them that the fall of one of Parker's companies would not affect the continuing success of Professional Service. Some investors asked petitioner to redeem their contracts but were unable to obtain repayment; others, relying upon petitioner's representations that Professional Service was still solvent, continued to retain their contracts (Tr. 262-271, 1019-1020, 1050). Professional Service was declared bankrupt within a few months, and creditors lost about 75 percent of their investments (Tr. 398).

2. As noted, Parker testified at length on behalf of the government, strongly incriminating petitioner. On cross-examination, counsel for co-defendant William

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[2]In his own testimony, petitioner denied having such knowledge and said that he was merely a salesman unaware of the insolvent nature of the company (Tr. 1200, 1204-1290).

Campbell[3] asked Parker about the bargain made with the government in exchange for Parker's cooperation. The witness replied that he had agreed to plead guilty to one of six counts and to give truthful testimony in the trial of his co-defendants. Asked if any arrangement had been made concerning the remaining five counts against him, Parker replied that he knew of no agreement to dismiss those counts (Tr. 918-923; Pet. App. A 8a-10a). To defense counsel's question whether any agreement had been reached as to the remaining counts, government counsel replied, "The answer is 'no'" (Tr. 923). Continuing to remain skeptical that Parker's plea bargain would not include some disposition of the remaining counts, defense counsel pursued the matter further at a conference in the judge's chambers, and received acknowledgements from other government lawyers who had attended the plea-bargaining sessions (the attorney handling the trial had not) that a promise to dismiss the five remaining counts had been made, conditioned upon a plea of guilty to the conspiracy count and the giving of truthful testimony at petitioner's trial (Tr. 942, 948). Parker continued to deny, however, that he had been informed about the proposed dismissal of the other counts (Tr. 961).

Later in the trial defense counsel called Jerome Winsberg, who had served as Parker's attorney during the plea-bargaining sessions. Winsberg disclosed to the jury the details of his negotiations with the government leading to the plea bargain. He stated that he and Parker had gone to the courthouse for a pretrial

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[3]Campbell, the attorney for Professional Service, was tried jointly with petitioner and was acquitted on all six counts. Campbell's trial counsel now represents petitioner.

conference. Parker remained in the hallway while Winsberg discussed a possible plea bargain with the United States Attorney, Mr. Walter, and other government attorneys, including Mr. McIlheran from the Securities and Exchange Commission. Winsberg told the government lawyers that the alternative to a settlement then was a lengthy continuance to allow Parker to obtain new counsel, since Winsberg was becoming a judge and would no longer be able to represent Parker. At a meeting later that same day, which Parker did not attend, Walter agreed that if Parker pled guilty to the conspiracy count, the government would not prosecute the other counts, provided that Parker testified truthfully against his co-defendants. Winsberg said he told all of the terms of the bargain to Parker, who later accepted them. Winsberg thought that he had "made it perfectly clear" to Parker that the government had agreed as part of the plea bargain not to prosecute the remaining counts (Tr. 1066-1086).

Following this testimony (and other unrelated testimony on behalf of the defendants), the defense rested. No motion for mistrial was made based upon the purported misstatement by Parker (Tr. 1455). In closing arguments, defense counsel referred to Winsberg's testimony in their attack upon Parker's credibility (Tr. 1488-1490). The court instructed the jury that the credibility of witnesses was a matter for it to determine and that inducements to testify were to be weighed in resolving issues of credibility (Tr. 1503-1510). Evidently having concluded that Parker was credible, the jury convicted petitioner.

3. Relying upon *Giglio* v. *United States*, 405 U.S. 150, which was decided after the trial in this case, petitioner claims that he was entitled to a new trial

because neither the prosecuting attorney nor Mr. McIlheran from the S.E.C., who was sitting at counsel table, had repudiated Parker's version of the conditions of the plea bargain in the presence of the jury. However, the present case differs significantly from *Giglio*. In *Giglio*, a prosecution witness had testified that he was not informed that he would not be prosecuted thereafter; the jury was never made aware in any manner of the government's promise to the witness that if he testified as a government witness he would not be tried, and the prosecutor stated (erroneously) in summation that the witness had received no promises. Here, the jury heard Parker's own former defense counsel contradict him.

Moreover, McIlheran and other government lawyers were readily available to petitioner to be summoned to testify on this limited question. Having already heard McIlheran and another government lawyer state under oath in chambers that the deals with Parker did include dropping five counts in exchange for a plea of guilty on the sixth count and truthful testimony (Tr. 942, 948), defense counsel could have exploited this discrepancy with Parker had they desired to pursue the matter further after adducing the testimony of Judge Winsberg. Instead, counsel chose to rest on Winsberg's account without the cumulative testimony of the government lawyers (Tr. 1489-1490). In any event, the government attorneys were not in a position to add to Winsberg's testimony as to what he had told Parker about the plea bargain agreement, as distinguished from what had in fact been agreed to by Winsberg and the government attorneys. That there had been an agreement to drop the other five counts was acknowledged in the prosecutor's closing argument (Tr. 1492).

While, as the court of appeals noted (Pet. App. A 11a-12a), the conduct of the government attorneys may have been open to criticism, the prosecution cannot be faulted for the strategic decision of defense counsel to pursue the matter with Parker, or for Parker's continued insistence that he did not recall Winsberg's mentioning of withdrawal of the five counts as part of the plea bargain.

Here, unlike *Giglio*, the jury's resolution of Parker's credibility was with knowledge of the full extent of his inducement to testify favorably for the government. As to this issue, the court of appeals correctly determined that no reversible error had been committed.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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[4]Following this trial, Parker was sentenced to five years' imprisonment and a $10,000 fine, the maximum term. His claim that the conditions of his plea bargain had not been complied with was rejected by the court of appeals. *United States* v. *Parker*, 479 F. 2d 1047 (C.A. 5). After sentencing, Parker filed an affidavit recanting certain of the statements made at petitioner's trial. The district court denied petitioner's motion for a new trial based upon Parker's affidavit. The court of appeals, however, concluded that certain representations in the affidavit required further examination to ascertain whether Parker had committed perjury in stating that petitioner was aware of the finances of Professional Service almost from the outset and whether there was any truth to Parker's allegations that the prosecution knowingly failed to reveal a promise to Parker of a low sentence or allowed false testimony concerning petitioner's knowledge of Professional Service's finances to stand uncorrected at petitioner's trial. On these matters the court of appeals remanded for an evidentiary hearing (Pet. App. A 12a-16a).